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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/899,789	07/06/2001	Nathan L. Feldman	1295.01	3744

7590 09/05/2003
Melvin K. Silverman
Suite 500
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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 09/05/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/899789

Applicant(s)

FELDMAN ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☐ Responsive to communication(s) filed on _____
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-12 is/are pending in the application.
- ☐ Of the above claim(s) 11, 12 is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-10 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
 - ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____
 - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

Office Action Summary

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This application contains claims directed to the following patentably distinct species of the claimed invention:

Species I as represented, for example, by Figure 1, wherein the piston is a separate element from the closures.

Species II, as represented, for example, by Figures 9 and 10 wherein the piston is part of one of the closures.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claim is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the

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case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

During a telephone conversation with Mr. Silverman on 8/15/03 a provisional election was made with traverse to prosecute the invention of species I, claims 1-10. Affirmation of this election must be made by applicant in replying to this Office action. Claims 11-12 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shapiro et al (6,054,157).

In regard to claim 1, Shapiro et al discloses a system for the convenient dispensing of a semi-solid comestible (e.g., dough) from a sealed container comprising a substantially unitary cylindrical sleeve having first and second ends and formed of a substantially rigid material (col. 1, para. 6), a first "base" (actually what applicants' call a "base" is a cover or lid and is shown as 14 in Shapiro et al), the periphery of the first base secured to the sleeve proximally the first end, means for enabling a selectable separation of the first base from the sleeve (e.g., snap fit, interference fit or threaded connection – col. 3, para. 1), a quantity of comestible (20) disposed within the sleeve

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against the first base, a wafer-like piston (16) disposed within the sleeve upon a side of the comestible opposite the first base, with said piston being in press-slidable relationship to the interior walls of the sleeve and a second base (12) at the second end of the sleeve being substantially complementary to the periphery of the sleeve, secured in fluid tight relationship and having means for selectable release of the second base from the sleeve. Thus, Shapiro et al discloses applicants' structure for applicants' reason; i.e., to provide a storage container that also allows for dispensing of the product. Claim 1 differs from Shapiro et al in the specific recitation of the width of the piston. Shapiro et al is silent in regard to the particular thickness. However, since Shapiro et al employs a piston for the same reason applicants' employ their piston, the particular thickness of the piston is seen to be nothing more than routine determination and an obvious result effective variable being an obvious function of material, degree of rigidity, etc. Applicants range covers about .4 inch to about 2 inches. Claim 1 also recites that the first base is defined by a radial cross-section of the sleeve. It is not clear what this means. What does "defined by" mean in this context? In any case, if "defined by" means its size, any base (or cover or lid) is sized according to the cross section of the container it is to be associated with. That is, the lid or cover must fit the container. In regard to claims 2-7, 9 and 10, the particular conventional materials of construction are seen to have been an obvious matter of routine determination. The selection of plastics and metals are, of course, notoriously old in the packaging art. In fact, Shapiro discloses the alternative use of plastics or metals (col. 2, line 57 plus). Claim 6 also recites a sleeve thickness, which, as with the piston thickness, is seen to have been an

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obvious result effective variable and being an obvious function of rigidity, weight and price considerations.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shapiro et al ('157) as applied to claim 1 plus above, and further in view of DeCoster (5,082,135) and Bateman et al (4,179,040).

Claim 8 differs from Shapiro et al in providing the sleeve and the follower with channels and protrusions which complement each other. As evidenced by DeCoster and Bateman et al, it is well established when providing inserts in containers which are intended to move through the container, such as a follower, to provide a complementary channel/ridge arrangement. DeCoster, for example, discloses that the guide rib/peripheral recess assembly provides vertical guidance and stabilization of the follower insert (e.g., col. 2, para. 1). To modify Shapiro et al and provide the container and piston (or follower) with such structural expedients for guiding and stabilization would therefore have been obvious.

The remainder of the references cited on the USPTO 892 forms are cited as art of interest.

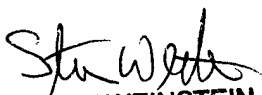
Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone number for the organization where this application assigned is (703) 872-9306.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

Steven Weinstein/mn
September 3, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER 1761
9/5/03